Filed 2/23/05 P. v. Fernandez CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR FERNANDEZ, Defendant and Appellant.	F045119 (Super. Ct. No. 28575) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. William T. Ivey, Judge. ((Retired Judge of the Merced Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION AND GENERAL FACTS

On September 13, 2004, Los Banos Police Officer Nathan Bowling conducted a routine traffic stop of the vehicle defendant Arthur Fernandez was driving because the front driver's side window of the vehicle was darkly tinted and Officer Bowling could not see inside the passenger compartment. Due to an unrelated circumstance, defendant was arrested. When the vehicle was searched prior to impound, a small metal box was found between the center console and the passenger seat. A white rock substance containing .24 grams of methamphetamine was found wrapped in tin foil inside the box. Two plastic tubes containing a powdery residue and a piece of tin foil containing a white burnt crystal substance which appeared to be methamphetamine were found elsewhere inside the vehicle. A plastic baggie containing a powdery residue of an off-white substance was found underneath the driver's seat.

Defendant was charged with multiple drug-related offenses; three prior imprisonment enhancement allegations were pleaded. He filed a pretrial suppression motion, which was heard and denied on January 20, 2004. Defendant was convicted after jury trial of transporting methamphetamine and the court found all three enhancements true. (Health & Saf. Code, § 11379; Pen. Code, § 667.5, subd. (b).)[1] He was sentenced to an aggregate term of seven years' imprisonment.

Defendant argues that his suppression motion should have been granted because Officer Bowling erroneously believed that all window tinting was illegal, that the prosecutor committed prejudicial misconduct by misleading the jury about the meaning of "beyond a reasonable doubt" in his closing arguments, and that selection of the upper term for the substantive offense violated his Sixth Amendment jury trial

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[1] Unless otherwise specified all statutory references are to the Penal Code.

right, as interpreted in *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). Having found none of these arguments convincing, we will affirm.

DISCUSSION

I. The suppression motion was properly denied.

A. Facts

Officer Bowling was the only witness at the suppression hearing. He testified that at approximately 8:20 p.m. he was driving a marked patrol car in a southbound direction on West Side Street. Defendant's vehicle was traveling northbound on West Side Street. It was stopped, waiting for traffic to clear so that it could turn left onto westbound Route 152. As Officer Bowling passed the vehicle, he observed that the driver's side window "was tinted to the point where I could not see within the passenger's compartment of the vehicle to see who was in the vehicle or whether a seatbelt or anything like that was being worn." Officer Bowling estimated his speed at approximately 25 to 30 miles per hour when he passed the vehicle. He does not recall whether the sun had set. He estimates that he looked at the window "[l]ong enough to see that it was tinted and dark." Officer Bowling also testified that "[a]ny window film that's applied to the glass which darkens it is a violation of Vehicle Code Section." To his knowledge, no window tinting is legal.

Defense counsel argued that some window tinting is legal and that the traffic stop was invalidated by Officer Bowling's erroneous belief that all window tinting was illegal. Relying on *U.S. v. Wallace* (9th Cir. 2000) 213 F.3d 1216 (*Wallace*), the trial court rejected this argument. It concluded that Officer Bowling's mistaken belief concerning the legality of window tinting did not negate the probable cause to stop defendant's vehicle because "there are articulable facts of illegality warranting the stop for the tinted windows in this case." Also, the court stated that neither the time of day that the stop occurred nor the brevity of the officer's period of observation was

sufficient to preclude formation of a reasonable suspicion of a vehicular violation. The court reasoned that even if it was nighttime, Officer Bowling could have observed whether the tinting was obscuring the windows because the patrol vehicle's lights were shining towards defendant's vehicle, and that impressions may be formed "within split seconds."

B. Analysis

"[I]t is settled that in ruling on a motion under section 1538.5 the superior court sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences, and hence that on review of its ruling by appeal or writ all presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court's express or implied findings if they are supported by substantial evidence." (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) Exercising its independent judgment, the reviewing court then measures the facts, as found by the trier, against the constitutional standard of reasonableness. (*People v. Leyba* (1981) 29 Cal.3d 591, 597.) Only evidence admitted at the suppression hearing is to be considered when assessing the correctness of the challenged ruling. (Cf. *People v. Marks* (2003) 31 Cal.4th 197, 218, fn. 3.)

"[A] police officer can legally stop a motorist *only* if the facts and circumstances known to the officer support at least a reasonable suspicion that the driver has violated the Vehicle Code or some other law." (*People v. Miranda* (1993) 17 Cal.App.4th 917, 926.) Defendant argues that there are no facts to support the lower court's finding that Officer Bowling had a reasonable suspicion that defendant was breaking the law by driving a vehicle with illegally tinted windows. We disagree.

Generally speaking, it is unlawful to tint the windows of a vehicle in a manner that reduces or obstructs a driver's view. (Veh. Code, §§ 26708, subd. (a); 26708.5, subd. (a).) "If an officer forms an opinion in a commonsense examination of a vehicle

that there is a film placed upon the vehicle's windows in an unauthorized place or that light is obstructed in the fashion contemplated by the statute, such evidence will be sufficient to support conviction under section 26708(a) if the trial court believes the officer; no further evidence or scientific testimony need be presented." (*People v. Niebauer* (1989) 214 Cal.App.3d 1278, 1292.)

Officer Bowling testified to the darkness of the tint, not just to its mere presence on the windows. He testified that as he drove by defendant's vehicle he looked over at it and he could not see inside the passenger compartment. He elaborated, "When I observed the window I noticed it was tinted to the point where I could not see within the passenger's compartment of the vehicle to see who was in the vehicle or whether a seatbelt or anything like that was being worn." Officer Bowling's inability to see inside the passenger compartment supports a reasonable suspicion that the tinting was not legal because such dark tinting reduces the driver's view from the window.

Defendant points out that Officer Bowling testified that he briefly observed defendant's vehicle as he drove by it and that it was 8:30 p.m. on a September evening. However, these facts were considered by the lower court when assessing Officer Bowling's credibility. Such credibility determinations properly are made by the trial court. (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410.) The trial court cogently explained when it denied the suppression motion that if it was dark outside, the lights from the officer's vehicle would still have been shining toward defendant's vehicle and that impressions can be formed quickly, even during the brief period that it takes to drive by a stopped vehicle. These conclusions are reasonable and are supported by the record.

The constitutionality of a traffic stop does not depend on the subjective motivation of the officers. (*Whren v. United States* (1996) 517 U.S. 806, 813.) It is

the objective circumstances that are determinative. (*Wallace*, *supra*, 213 F.3d at p. 1219.) Since the record contains objective circumstances establishing probable cause to believe that a traffic violation occurred, Officer Bowling's mistaken belief that all window tinting was illegal is immaterial.

People v. Butler (1988) 202 Cal.App.3d 602, which is relied upon by defendant, is distinguishable. There, the officer stopped Butler's vehicle because, in substantial part, it had tinted windows and the officer "'didn't like the idea of the tinted windows.'" (*Id*. at p. 606.) The appellate court reversed the denial of Butler's suppression motion because the officer did not testify that he could not see inside the passenger compartment of the vehicle or otherwise provide any facts supporting a reasonable inference that the window tinting was illegal. The appellate court explained, "Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop." (*Id*. at p. 607.) In contrast here, Officer Bowling provided the requisite "additional articulable facts" by testifying that the windows of defendant's vehicle were so darkly tinted that he could not see inside the passenger compartment.

We agree with the trial court that *Wallace, supra,* 213 F.3d 1216 bears greater similarity to this case. There, an officer patrolling in San Diego pulled over appellant's vehicle after driving alongside it and observing that all of the windows were tinted. The officer testified that the windows were tinted enough to make it difficult to view the interior of the passenger compartment. When the officer stopped appellant, he erroneously believed that the Vehicle Code prohibited any tinting of a vehicle's front side windows. The reviewing court affirmed the lower court's denial of the suppression motion, reasoning that the officer's legal error was immaterial because the objective circumstances justified the stop. (*Id*. at p. 1219.) It explained that the

officer's "mistaken impression that all front-window tint is illegal is beside the point. [The officer] was not taking the bar exam. The issue is not how well [he] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation. The undisputed facts show that he did." (*Id*. at p. 1220.)

Just as in *Wallace*, the record in this case supports an objectively reasonable suspicion that the window tinting at issue violated Vehicle Code section 26708. This provided Officer Bowling with reasonable cause to conduct a limited traffic stop. By a parity of reasoning, we likewise conclude that denial of the suppression motion was not erroneous and did not violate any of defendant's constitutional protections.

II. Defendant waived review of the prosecutor's alleged misconduct; defense counsel's failure to object did not render his representation ineffective.

Defendant contends that the prosecutor committed prejudicial prosecutorial misconduct during closing arguments by misleading the jury about the meaning of "beyond a reasonable doubt." He challenges the propriety of the following comments, made during the prosecutor's initial closing argument:

> "Now, if you just stand back from this case and you look at things as a regular person on the street everyday, somebody comes up to you and says, 'Hey, did you hear about so and so?' 'No, what about so and so?' 'Well, they were stopped in a car with drugs in the car.' 'Well, yeah, that means they're guilty.' Okay. That's the way we typically tend to look at things. That's not necessarily unfair either by the way you make that conclusion. Based upon what's been presented to you a person was stopped by the police driving a car, drugs were found in the car. You find out there's nobody else in the car. Well, he's responsible for it. Okay. You are not required to do something in this courtroom that you wouldn't do in ordinary life. All right. You look at things every day and make judgment on things every day. You make judgments about people. You make judgments about events every day of your life. You're not required to do anything different in this courtroom than what you did [in] your every day life."

Defendant also challenges the propriety of these remarks, made by the prosecutor's during his final closing argument:

> "The fact that defense counsel throws out all these possibilities, while it was possibly somebody else's car, it was possibly this or possibly that. That isn't evidence. That's not evidence. The jury instruction requires you to make a consideration of the evidence to determine whether or not it's reasonable. Okay. The evidence is not all possibilities. If we were required again to disprove every possibility that the defense attorney can come up with, nobody would ever get convicted because a well-motivated defense attorney can come up with any number of possibilities. Give them enough time and they'll come up with [innumerable possibilities]. That does not mean that it's evidence.
>
> "Okay. So you have to concentrate on what the evidence is and determine whether or not that's reasonable."

Defense counsel did not object to either of these arguments. """It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion" -- and on the same ground -- "he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.""" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) There is no indication in the record in this case that timely objection would have been futile or that a timely admonishment could not have cured the alleged harm. The trial court did not exhibit preference in favor of the prosecutor or demonstrate animus against defense counsel. The trial court had not directed counsel to refrain from interruption during closing remarks or overruled other objections raised during closing remarks. The challenged remarks do not fall in the narrow category of comments that are so inflammatory or outrageous that judicial admonishment would have been ineffective. Therefore, the general rule applies; the alleged misconduct was not preserved for appellate review.

We reject defendant's related ineffective assistance claim because defense counsel's silence may have been a deliberate tactical choice and because defendant did not establish prejudice. To establish ineffectiveness on direct appeal, one must affirmatively demonstrate that counsel did not have a rational tactical purpose for defense counsel's omission. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Defendant did not meet this burden. "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) In the heat of trial, defense counsel is in the best position to determine the appropriate tactical choices based on his or her assessment of the jury's reaction to the proceedings. (*People v. Jackson* (1980) 28 Cal.3d 264, 291-292.) In this case, defense counsel reasonably could have concluded that objection might have been poorly received by the jury or that it would have called undue attention to an otherwise forgettable argument. Defendant also failed to show that there is a reasonable probability that the challenged omission adversely affected the verdict. This was not a close case. The proof of his guilt on the drug transportation charge was strong and his defense was not credible. It is not reasonably probable that the jury would have acquitted defendant of the transportation offense in the absence of the challenged remarks.

III. Imposition of the upper term did not infringe defendant's Sixth Amendment right to jury trial, as interpreted in *Blakely*.

The sentencing court imposed the upper term of four years for the substantive offense plus an additional year for each of the three prison priors, for a total term of seven years' imprisonment. In selecting the upper term, the sentencing court relied on the following two aggravating circumstances: (1) defendant's prior convictions as an adult and his sustained petitions as a juvenile "are numerous and of increasing

seriousness"; and (2) "his prior performance on probation and parole has been unsatisfactory."

Defendant contends that judicial selection of the upper term infringed his Sixth Amendment jury trial right, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Blakely*. We reject this argument because the sentencing court based this decision on defendant's recidivism. It did not rely on an offense-related factor that was not implicit in the jury's verdict.

In *Apprendi*, a five-justice majority of the United States Supreme Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) In *Blakely,* the same five justices voted in favor of extending *Apprendi* to apply to the imposition of an "exceptional" sentence under Washington state law. Justice Scalia's majority opinion held that the trial court had violated defendant's Sixth Amendment jury trial right by sentencing him to a 90-month "exceptional" sentence, which is 37 months beyond the crime's "standard range" of 49 to 53 months. He reasoned that 53 months is "the 'statutory maximum' for *Apprendi* purposes" because this "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2537] emphasis in original.) Since the jury had not found beyond a reasonable doubt the ground upon which the judge based the "exceptional" sentence, defendant's Sixth Amendment trial right had been infringed. Most recently, a majority of the United States Supreme Court held in *United States v. Booker* (2005) 243 U.S. __ [2005 WL 50108] that the Sixth Amendment, as interpreted in *Blakely*, applies to the federal sentencing guidelines.

Numerous cases concerning the effect of *Blakely* on California's determinate sentencing law are currently pending in our Supreme Court. *People v. Towne*, review granted July 14, 2004, S125677, and *People v. Black*, review granted July 28, 2004, S12612, are the leading cases. Therein, our high court will decide whether *Blakely* affects the validity of judicial selection of the aggravated term and consecutive sentencing. The positions we have adopted regarding the *Blakely* issues presented in this matter necessarily are tentative and are subject to modification after decisions are issued in these pending cases.

At the outset, we must dispose of the Attorney General's contention that defendant waived this challenge by failing to object on Sixth Amendment grounds during sentencing. We agree with decisions concluding that the waiver rule of *People v. Scott* (1994) 9 Cal.4th 331 is not applicable to *Blakely* challenges and that failure to assert a Sixth Amendment objection during sentencing does not result in forfeiture of the issue on appeal.[2] Prior to *Blakely*, the state of the law was such that challenge to the sentence on a jury trial basis would have failed; objection would not have resulted in prompt detection and correction of the alleged error. Also, because *Blakely* was decided after defendant was sentenced, he cannot be said to have knowingly and intelligently waived this right.

We now turn to the substantive issue. Irrespective of the ultimate resolution of broader questions pertaining to the constitutionality of California's determinate sentencing scheme and judicial decisionmaking about offense-related sentencing

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[2] See, e.g., *People v. Jaffe* (2004) 122 Cal.App.4th 1559, review granted January 26, 2005, S129344; *People v. Picado* (2004) 123 Cal.App.4th 1216, review granted January 19, 2005, S129826; *People v. George* (2004) 122 Cal.App.4th 419, review granted December 15, 2004, S128582.

factors in our Supreme Court, in this case defendant's argument fails because the upper term was not imposed as a result of a discretionary judicial decision about an offense-related factor. Rather, the upper term was selected because of defendant's recidivism. The court did not reference any offense-related factors. *Blakely* and *Apprendi* both specifically excluded the fact of prior convictions from their holdings. (*Blakely, supra*, 542 U.S. at p. ___ [124 S.Ct. at p. 2536]; *Apprendi, supra*, 530 U.S. at p. 490.) The prior conviction exception in *Apprendi* has been broadly construed to apply to facts relating to defendant's recidivism. (*People v. Thomas* (2004) 91 Cal.App.4th 212, 221-223.)[3] Thus, imposition of the upper term is constitutional.

DISPOSITION

The judgment is affirmed.

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Levy, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Buckley, J.

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[3] See also, e.g., *People v. Vu* (2004) 124 Cal.App.4th 1060, review granted February 16, 2005, S130656; *People v. George, supra,* 122 Cal.App.4th 419, review granted December 15, 2004, S128582.